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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-8021

JOSFINA ACUNA, CECILIO AGUIRRE, MANUEL ALVAREZ, JOSE BARGAS, CARMEN BECERRA, ELISEO BECERRA, RAFAEL CAMARENA, JESUS CASILLAS, ANGEL CASTOR, LUIS CERVANTES, JOSE CHEVEZ, RUBEN CLEMENTE, JESUS COMPARAN, RODOLFO CORTES, JOSE COVARUVIAS, MAURICIO CUELLAR, JOSE CURIEL, ALFREDO DUARTE, SANTIAGO E. ESQUIVEL, ALBERTO FIERROS, GABRIEL FIERROS, SILVIA FIERROS, MARIA FRANCO, BIANCA GALLARDO, HOMERO GARCIA, GEORGE GARNICA, ANTONIO GONZALES, FERNANDO GONZALEZ, JESUS GONZALEZ, JOSE GONZALEZ, MANUEL J. MACIAS GONZALEZ, MARTHA GANZALEZ, OFELIA R. GONZALEZ, ROBERTO GONZALEZ, RUBEN GONZALEZ, ESPERANZA HERRERA, AMALIA JOYA, ADAN MACIAS, EMILIO MARAVILLA, TERESA MEJIA, ANTONIO MENDEZ, ROBERT MENDEZ, ALEJANDRO MILLER, CARLOTTA MOLINA, CARMEN MONTEON, JOSE MORALES, VICTORIA MORENO, SERGIO NARES, MANUEL NIEVES, FIDEL OCEGEDA, GLORIA OLIVAS, JOLIETA ORTEGA, GLORIA PEDRAZA, SONNIA PEREZ, DONATO PRECIADO, ANGEL RAMIREZ, EUGENIO RAMIREZ, TEDFILO REYES, ALBERTO RIVERA, MARIA RODRIGUEZ, REYNALDO RODRIGUEZ, DANIEL SANCHEZ, ROLANDO SANTOS, VIRGINIA TRISTAN, TRINIDAD P. VARGAS, and REBECCA VASQUEZ,

Petitioners and Appellants,

vs.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD,

Respondent and Respondent.

PETITION FOR A WRIT OF CERTIORARI.

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vs.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD,

Respondent and Respondent.

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable Justices of the United States Supreme Court:

Petitioners respectfully petition this Honorable Court for a Writ of Certiorari to review a judgment of the Court of Appeal of the State of California, Second Appellate District, entered in this case on September 23, 1975.

Opinions Below.

The opinion of the Court of Appeal of the State of California, Second Appellate District (App., *infra*, pp. A1-A7) is not yet reported. A petition for hearing was denied by the Supreme Court of California, without opinion, on November 20, 1975.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Question Presented.

Does the refusal of the state to grant unemployment insurance benefits to employees striking in protest against their employer's unfair labor practices contravene federal labor policy by punishing employees for exercising rights guaranteed by the Labor-Management Relations Act of 1947, as amended?

Constitutional Provisions Involved.

Article VI, Clause 2 of the United States Constitution is set forth at App., *infra*, p. A8.

Statutes Involved.

The pertinent provision of the Labor-Management Relations Act of 1947, as amended (29 U.S.C. 141 *et seq.*), and Sections 1262 and 2677 of the Unemployment Insurance Code of the State of California are set forth at App., *infra*, pp. A8-A10.

Statement of the Case.

Petitioners sought mandamus to set aside an order of the California Unemployment Insurance Appeals Board denying Petitioners unemployment insurance benefits. Judgment was entered against Petitioners.

Petitioners, claimants for unemployment insurance benefits, sought to reverse the Department decision that they were disqualified for unemployment insurance benefits because they were involved in a "trade dispute" within the meaning of Sections 1262 and 2677 of the Unemployment Insurance Code of California but were unfair-labor-practice strikers within the protection of the Labor-Management Relations Act of 1947, as amended.

The Court of Appeal affirmed the judgment of the trial court on September 23, 1975 and the Supreme Court of California denied a hearing on November 20, 1975.

REASONS FOR GRANTING THE WRIT.

A. The Decision Below Raises an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

The knotty problem of the entitlement of unfair labor practice strikers was first presented to this Honorable Court by the Petitioners, through their union, when it sought, and was granted leave, to file a brief, as amicus curiae, in *Super Tire Engineering Co. v. McCorkle* (414 U.S. 1125).

The ultimate decision of your Court on April 16, 1974, was to reverse the judgment of dismissal in *Super Tire*, on the ground of mootness, and reserve for a later date, and a complete record, resolution of the substantive issue. (*Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115.)

That complete record exists in the instant case and the time is now ripe for the resolution of this substantial problem in the administration of national labor policy. An uncontradicted record reflects that Petitioners went on strike following which they filed charges of unfair labor practices with the National Labor Relations Board against their employer, alleging failure to bargain in good faith.

After investigation of the charges, the Regional Director of the National Labor Relations Board concluded that the strike had become an unfair-labor-practice strike on May 2, 1973. Based on that determination, and pursuant to the provisions of the Administrative Procedures Act, he advised the employer, that, absent settlement, a complaint would issue. The employer elected to enter into a settlement agreement offering reinstatement to employees not permanently replaced prior to May 2, 1973, or make them whole

for lost wages. The employer also agreed to bargain in good faith with the union. The General Counsel of the National Labor Relations Board advised that if the settlement had not been effected, a complaint would have issued against the employer.

Notwithstanding, the California Unemployment Insurance Appeals Board determined that Respondents were engaged in a "trade dispute" within the meaning of Sections 1262 and 2677 of the California Unemployment Insurance Code and denied them benefits.

B. This Court Should Determine Whether State Denial of Unemployment Insurance Benefits to Unfair-Labor-Practice Strikers Improperly Infringes Upon the Federal Labor Policy Protecting Unfair-Labor-Practice Strikers.

The fundamental issue raised in this case is whether the state may discourage employees from engaging in a strike against their employer's unfair labor practices when that strike is specifically protected by federal labor policy. The state, under the pious claim of "neutrality" nevertheless saps the financial ability of employees to strike in protest of their employer's violation of the law when it denies them unemployment insurance benefits. In this case, the State of California is "neutral," but it is "neutral" against Petitioners. This policy of "neutrality" was best described by a former senior attorney of the Federal Security Agency who noted that ". . . whatever may be the merits of this theoretical argument, it seems absurd to assert that a policy of "neutrality" *i.e.*, denial of benefits, is called for in instances in which the dispute has been engendered by a breach of law by the employer. . . ."[1]

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[1]55 Yale Law Journal, 167, 171, 176.

Your Honorable Court has held, on a number of occasions, that if the right to strike to protest unfair labor practices were not given special protection under the law, "this would relegate the employees to filing charges under a procedure too slow to be effective."[2]

You then went on to point out that "the result would be to penalize the employees for the wrong doing of the employer." (*Mastro Plastics, supra,* pp. 286-287.)

The employees have two rights guaranteed them by federal labor law—the right to file charges with the National Labor Relations Board and the right to strike in support of those charges. You have already held that the denial of unemployment insurance benefits for invoking one of those rights conflicted with federal labor policy,[3] you are now called upon to hold that the same denial of unemployment insurance benefits is applicable to the exercise of the other right, the right to strike in support of those unfair labor practices.

California, in this case, just as Florida, in *Nash v. Florida Industrial Commission, supra,* has determined to put Petitioners to an election of remedies, rights and forums. As the National Labor Relations Board noted in its brief in *Nash, supra,* ". . . we deny that a state can force such an election where, as here, to do so is to exact a heavy price for the assertion of federally created right."

This is particularly true where public rather than "purely private" rights are at stake.[4] The State of

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[2]*Mastro Plastics v. NLRB,* 350 U.S. 270 (Footnote 19).

[3]*Nash v. Florida Industrial Commission,* 389 U.S. 235.

[4]*National Licorice Company v. NLRB,* 309 U.S. 350, 362-363.

California has no standing to put Petitioners to a Hobson's choice of filing an administrative proceeding which might take up to two years to be concluded or to strike in support of their administrative proceeding, a right guaranteed by federal law.

Since your decision in *Super Tire v. McCorkle, supra,* the District Court of Hawaii had decided that the grant of unemployment benefits to *economic* strikers interfered with federal labor policy.[5] The very same logic militates against the refusal of such benefits to *unfair-labor-practice* strikers, who are acting as private Attorneys General in implementing the enforcement of the law.[6]

Conclusion.

For the foregoing reasons, Petitioners respectfully urge that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

LIONEL RICHMAN, ESQ.,
Attorney for Petitioners.

RICHMAN & GARRETT,
A Professional Corporation,
Attorneys at Law,
Of Counsel.

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[5]*Hawaiian Tel. Co. v. State of Hawaii, Dept. of L & I Rel.*, 378 F.Supp. 791, 796.

[6]*Flintkote Co. v. Lysfjord*, 246 F.2d 368, 398; *Weinberg v. Sinclair Roofing Co.*, 48 F.Supp. 203.

APPENDIX.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

Josfina Acuna, et al., Petitioners and Appellants, vs. California Unemployment Insurance Appeals Board, Respondent. 2d Civ. No. 46043 (Superior Crt. No. C 91261).

Filed: Sept. 23, 1975.

APPEAL from judgment of the Superior Court, Los Angeles County. Norman R. Dowds, Judge. Affirmed.

Lionel Richman and Walter C. Appling, Richman & Garrett, for Petitioners and Appellants.

Evelle J. Younger, Attorney General, and Melvin R. Segal, Deputy Attorney General, for Respondent.

Appellants sought unemployment insurance benefits. Their claims were denied by respondent California Unemployment Insurance Appeals Board ("the board"). Their petition for writ of mandate was denied by the trial court and this appeal followed.

"It is not the province of this court to consider the arguments of social policy which have been urged upon it by each side; these are matters which must be, and no doubt were, addressed to the legislature. We have no authority to question the wisdom or unwisdom of the scheme set up by the statute, and we cannot deliberate upon the social desirability of making benefit payments to groups which are excluded by the statute. . . ." (*Bodinson Mfg. Co. v. California Emp. Com.* (1941) 17 Cal.2d 321, 325.)

The court below independently considered and weighed the evidence adduced at appellants' administrative hearing. It found that the weight of the evidence supported an administrative determination that benefits should be denied to appellants since they voluntarily left their employment because of a trade dispute.

Appellants left their jobs on April 6, 1973, contending that their employer was bargaining in bad faith. An actual strike started on April 16, 1973, picket lines being established. Appellants and other employees filed charges with the National Labor Relations Board ("NLRB"). A regional director of the NLRB concluded that, on May 2, 1973, the strike had become an unfair labor practice. The employer and the union then entered into a settlement agreement under which the employer was required to reinstate employees not permanently replaced prior to May 2, 1973. The employer agreed to bargain in good faith with the union. The employer denied any wrong doing. The general counsel of the NLRB advised that a complaint charging unfair labor practices by the employer would have been filed had there not been a settlement. Appellants claim that they were entitled to unemployment insurance benefits commencing on May 2, 1973.

Appellants' argument on this appeal is that they were striking because of unfair labor practices on the part of the employer. Accordingly, they urge, they did not voluntarily leave their employment. Therefore, the argument goes, they were not engaged in a trade dispute within the meaning of the Unemployment Insurance Code[1] and could not be denied benefits. Further, it is urged that to deny benefits for this reason conflicts with federal law.

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[1]All section references are to that code unless otherwise noted.

I.

Section 1262 provides: "An individual is not eligible for unemployment compensation benefits, and no such benefit shall be payable to him, if he left his work because of a trade dispute. Such individual shall remain ineligible for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed."

Employees who voluntarily leave work because of trade disputes are ineligible for unemployment compensation benefits where the cause of the continuing absence is the trade dispute. In determining whether a trade dispute exists each case must be decided on its own facts. (*Isobe v. Cal. Unemployment Ins. Appeals Board* (1974) 12 Cal.3d 584, 589.)

A trade dispute clearly existed in the instant case. According to appellants themselves, the dispute between them and their employer arose out of appellants' claim that the employer was bargaining in bad faith in view of its failure to reach any significant agreement on any contract provisions. At the same time, according to appellants, company "leadpersons" were attempting to undermine appellants' union by distributing slips for signature indicating that the employees did not want the union. The employees thereupon left work on April 6, 1973, and 10 days later went on strike and established a picket line. The establishment of a picket line, the Supreme Court has told us, "is an economic weapon directed against the employer by a union and recognition of it by a fellow worker amounts in effect to participation by him in the trade dispute it represents." (*Bunny's Waffle Shop v. Cal. Emp. Com.* (1944) 24 Cal.2d 735, 742.) There simply

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is no basis for arguing that a trade dispute did not exist.

The corollary to the volitional test articulated in *Isobe, supra,* and first enunciated in *Bodinson Mfg. Co. v. Cal. Emp. Com., supra,* 17 Cal.2d 321, is that those who are involuntarily and innocently unemployed as a result of a labor dispute should not suffer loss accordingly. (*Chrysler Corp. v. Cal. Unemployment Ins. Appeals Board* (1962) 199 Cal.App.2d 683, 687.)

> "To carry out the intent of the Legislature, the courts in a given case inquire into the economic realities of the circumstances resulting in unemployment to determine whether there was any personal responsibility on the part of the claimant for his unemployment, or whether he was compelled to leave his work because of the acts of others. (*Bodinson Mfg. Co. v. California Emp. Com.*, 17 Cal.2d 321 [109 P.2d 935]; *Bunny's Waffle Shop, Inc. v. California Emp. Com.*, 24 Cal.2d 735 [151 P.2d 234]; *Matson Terminals, Inc. v. California Emp. Com.*, 24 Cal.2d 695 [151 P.2d 202]; *Chrysler Corp. v. California Emp. Stab. Com.*, 116 Cal.App.2d 8 [253 P.2d 68].) 'The volitional test itself is based upon a just analysis of a substantial subjective element and it cannot properly be extended or perverted by insistence upon mere form.' (*McKinley v. California Emp. Stab. Com.*, 34 Cal.2d 239, 245 [209 P.2d 602].)" (*Ibid.* at p. 687.)

It is appellants' argument that because the NLRB subsequently determined that the strike had become an unfair labor practices strike, it lost its voluntary character, and they were entitled to benefits. In this

connection it is argued that in determining eligibility the Department of Human Resources Development uses a mechanical test that does not inquire into the cause of the trade dispute. They urge that "the 'why' of the strike is at least as important as the fact of the strike." That carries the teaching of the cases too far and contravenes decisions of our Supreme Court by which we are bound.

The cases "hold generally that a claimant is not disqualified under the act as having voluntarily left his work unless he bears some possible responsibility for his unemployment." (*Chrysler Corp. v. Cal. Unemployment Ins. Appeals Board, supra,* 199 Cal.App. 2d at p. 693.) A causal relationship test has been applied to see if the employees left their work as a result of the application of an economic weapon asserted by the employer, as contrasted with the existence of a trade dispute. (Compare *Bunny's Waffle Shop v. Cal. Emp. Com., supra,* 24 Cal.2d 735, 742, with *McKinley v. Cal. Emp. Stabilization Com.* (1949) 34 Cal.2d 239.)

In the present case appellants themselves tell us that they left their work and then struck in order to coerce the employer into complying with his obligations to bargain collectively with their union. This was not a forced departure from work in response to the wielding of an economic weapon by the employer. It was a voluntary leaving directly on account of a trade dispute. Since "disqualification under the act depends upon the fact of voluntary action, and not the motives which led to it" (*Bodinson Mfg. Co. v. California Emp. Com., supra,* 17 Cal.2d 321 at p. 328), we may not inquire into the motives. We are further constrained: "It is not the function of

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the commission to evaluate the merits of a controversy between an employer and his employees; *if a trade dispute exists and the employee leaves his work because of it, he may not receive benefits even though his employer is in the wrong.*" (*W.R. Grace & Co. v. Cal. Emp. Com.* (1944) 24 Cal.2d 720, 731; emphasis supplied.) Thus, the department cannot be faulted for failing to take into account the NLRB staff conclusion that the employer was guilty of unfair labor practices.

Appellants also urge that section 1262 conflicts with the Labor Management Relations Act of 1947, and hence is invalid on account of the Supremacy Clause of the federal constitution. We do not think that this is the case. *Nash v. Florida Industrial Com.* (1967) 389 U.S. 235, relied upon by appellants, held that Florida could not deny unemployment insurance benefits to an employee who filed an unfair labor practices charge and lost her employment as a result. Florida claimed that the mere filing of the charge characterized the unemployment as "due to a labor dispute" within the meaning of the Florida statute. The United States Supreme Court ruled that to so interpret the Florida statute would frustrate the Congressional purpose of encouraging the filing of unfair labor practices charges.

In contrast, section 1262 reflects "a policy of neutrality in trade disputes by provisions that the payment or withholding of benefits should not be used to aid either party to a trade dispute." (*Matson Terminals, Inc. v. Cal. Emp. Com., supra,* 24 Cal.2d 695, 707, discussing the predecessor of the present statute.) It is clearly a federal policy to encourage free collective bargaining. (29 U.S.C. § 151.) Whether or not the "neutrality" mentioned in *Matson* is, or is not, an

even-handed withholding of benefits designed to aid neither party to a labor dispute, we must respect the foregoing determination of our Supreme Court that such is the case.

It is interesting to note that, with respect to a Rhode Island statute authorizing the payment of unemployment insurance benefits to strikers after a specified waiting period, a contrary challenge has been asserted, although not decided: that to pay benefits upsets the Congressional policy of free collective bargaining. (See, *Grinnell Corp. v. Hackett* (1st Cir. 1973) 475 F.2d 449.)

In connection with the claim of federal pre-emption we think it significant that only two states apparently allow persons unemployed due to labor disputes to recover benefits while the rest take a contrary position. That is not an indication of pre-emption. No conflict exists with federal law. (*Grinnell Corp., supra,* at p. 457.)

The judgment is affirmed.

Cole, *J.**

We concur:

Allport, Acting *P. J.*

Potter, *J.*

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*John L. Cole, Judge of the Superior Court of Los Angeles County, assigned by the Chairman of the Judicial Council.

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Constitution of the United States.

ARTICLE VI

Clause 2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Labor Management Relations Act of 1947.

29 USC 158(a)(5)

Unfair labor practices

It shall be an unfair labor practice for an employer—

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 USC 158(d)(4)

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:

Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

* * *

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158 to

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160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

Unemployment Insurance Code of the State of California.

Section 1262 provides:

> "An individual is not eligible for unemployment compensation benefits, and no such benefit shall be payable to him, if he left his work because of a trade dispute. Such individual shall remain ineligible for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed."

Section 2677 provides:

> "An individual who is disqualified from receiving unemployment compensation benefits under Section 1262 shall be presumed to be ineligible to receive disability benefits under this part for the same period or periods unless the individual establishes, pursuant to authorized regulations, that his alleged disability was the result of an accident or required a period of hospitalization, that it was not caused by and did not arise out of the trade dispute, and that it would have occurred and would have prevented him from continuing his work if the trade dispute had not occurred. Such an individual shall, except as provided in Section 2709, be subject to examination without cost to him by a medical examiner selected by the department, the insurer or self-insurer as the case may be to determine whether the above conditions have been met."